Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-1530

MAURICE GOLDBERG, CLAIRE GOLDBERG, MAURICE GOLDBERG, as Custodian for MARION GOLDBERG, BETTE GOLDBERG and JOYCE E. GOLDBERG, under The New York Uniform Gifts to Minors Act, and MAURICE GOLDBERG, HENRY J. GOLDBERG and SAMUEL M. SPRAFKIN, as Trustees under the Trusts for the benefit of MARION GOLDBERG, BETTE GOLDBERG and JOYCE E. GOLDBERG,

Petitioners,

—against—

ARROW ELECTRONICS, INC., and STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MAURICE GOLDBERG, CLAIRE GOLDBERG, MAURICE GOLDBERG, as Custodian for MARION GOLDBERG, BETTE GOLDBERG and JOYCE E. GOLDBERG, under The New York Uniform Gifts to Minors Act, and MAURICE GOLDBERG, HENRY J. GOLDBERG and SAMUEL M. SPRAFKIN, as Trustees under the Trusts for the benefit of MARION GOLDBERG, BETTE GOLDBERG and JOYCE E. GOLDBERG,

Petitioners,

—against—

ARROW ELECTRONICS, INC., and STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on March 25, 1975.

Opinions Below

The opinion of the Court of Appeals (not yet reported) is reprinted as Appendix "A". The memorandum of decision and order of the District Court, which are not reported, are set out as Appendix "B".

Jurisdiction

The judgment of the Court of Appeals was entered on March 25, 1975. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

New York Business Corporation Law compels a shareholder, who does not assent to a corporate merger, to make a choice. He either submits to the merger or accepts the right to receive the fair value of his shares. This right is subject to his compliance with procedures set out in Section 623. His share certificates are endorsed with the statutory legend. He ceases to have shareholder status. He cannot vote his stock. His shares cannot be traded on the stock exchange. He cannot withdraw his dissent without the corporation's consent. He is a monetary claimant for the value of his shares. If the corporation does not commence the judicial proceeding to determine such value, the dissenter must do so. Otherwise he loses his rights. The dissenter fully complies with the provisions of the statute and commences the judicial proceeding. The corporation thereafter unilaterally abandons the merger. The statute reinstates the dissenter to shareholder status. However, it does not restore him to the financial position in which he was when he ceased having shareholder status. His shares, in the meantime, have declined in value and price. The statute terminates the judicial proceeding which he had been compelled to commence. The statute denies him a forum in which to be heard and it forecloses him from claiming damages, losses and expenses.

1. Is Section 623 of the Business Corporation Law repugnant to the due process and equal protection clauses of the Fourteenth Amendment insofar as it is applicable to the abandonment of a merger by a corporation?

2. Is "state action" present within the meaning of the Fourteenth Amendment?

Statutory Provisions Involved

Section 910 of the New York Business Corporation Law (BCL §910) grants to a shareholder, who does not assent to a corporate merger, the right to receive payment of the fair value of his shares, provided he complies with the procedure set out in Section 623.

Section 623 of the New York Business Corporation Law (BCL §623) is entitled "Procedure to Enforce Shareholder's Right to Receive Payment of Shares."

The former is found in McKinney's Consolidated Laws of New York, Book 6, Part 2 and the latter in Part 1 of Book 6. The pertinent portion of the text of BCL §910 is set forth in Appendix "C" at page 25. The text of BCL §623 is set forth at pages 26-33.

Nature of the Action*

Petitioners commenced this action in the United States District Court for the Eastern District of New York. They seek a declaratory judgment that BCL §623 is unconstitutional insofar as it is applicable to an abandon-

* Numerals and letter "a" in parentheses refer to the page in the Appendix of the Record before the Second Circuit Court of Appeals, certified to this Court.

ment of a corporate merger. They claim that they were deprived of their property, rights and remedies, in violation of the Fourteenth Amendment.

Parties:

Petitioners are shareholders, holding less than five percent of the shares in Respondent, Arrow Electronics, Inc., a New York corporation whose shares are listed for trading on the American Stock Exchange (2a-5a, 86a, 121a).

The State of New York was named as a defendant because the action questions the constitutionality of a provision of a State statute. The New York Attorney General appeared on behalf of the State, but did not interpose any defense. The State took no position on the issues in the case.

Facts:

Respondent's existence as a New York corporation and Petitioners' shareholdings in Respondent predate the enactment in 1950 of the questioned statutory provision which now is a part of BCL §623(e) (68a, 73a).

Respondent corporation desired to merge into a Delaware corporation which was a shell with no assets. The stated purpose was to remove from New York to Delaware where the laws were more favorable to corporate expansion through mergers (73a-74a, 76a, 86a-87a, 96a).

The common law viewed the corporate charter as a contract between the corporation and all its shareholders, which could not be impaired without the consent of all parties to the contract. In order to grant the corporation the power to pursue changes which the majority desires,

it was necessary to compel objecting shareholders to submit, although the nature of their contract would be altered against their will. Under the statutes which were enacted, if a shareholder did not submit, provision was made for him to be compensated for the value of his shares.

In New York a shareholder, who does not assent to a plan of merger of his corporation into another corporation, acquires the right to be paid the fair value of his shares under BCL §910. This substantive right is subject to compliance by the shareholder with the procedural requirements set out in BCL §623.

In accordance with BCL §623(a) petitioners noted their objections to the proposed merger prior to the meeting. The purpose of such notice is to inform the corporation of the number of its shareholders who are objecting and of the amount of money it would require to pay for such dissenters' shares (Assn. of the Bar: 1934 State Legislation Bulletin). The amount to be paid is the value of the shares as of the day immediately preceding the day on which the merger is authorized by the shareholders [BCL §623(h)(4)].

When the shareholders' authorization meeting was held, Respondent corporation knew the number of objecting shares. It knew the trading prices of the previous day. It knew it required no less than $750,000. However, it had no money to pay for the shares of dissenting shareholders. Furthermore, its existing loan agreements with its institutional lenders did not permit it to pay for such shares. Nevertheless, the merger was authorized by the shareholders other than Petitioners (6a, 47a, 89a, 122a).

Petitioners filed their dissent and delivered their certificates which were endorsed with the statutory legend (6a-8a). Thus they no longer had any rights as shareholders. They ceased having shareholder status. They could not vote their shares. Their shares could not be sold or traded. A transferee would stand in the shoes of his transferor-dissenting shareholder. The dissent may not be withdrawn without the consent of the corporation subsequent to the 90th day after the shareholders authorization meeting.

Instead, Petitioners became monetary claimants for the value of their shares as of the day immediately preceding the shareholder meeting at which the merger was authorized. BCL §623(h)(1) required Respondent to commence the judicial proceeding to determine the rights of dissenters and the value of their shares. When Respondent failed to commence the proceeding, Petitioners did. Had they not commenced the proceeding they would have lost their rights [BCL §623(h)(2)]. When Petitioners sought to move forward with the proceeding, Respondent corporation succeeded in delaying it on the claim that it was negotiating for a loan to pay for Petitioners-dissenters' shares (88a-90a).

More than eight months after the shareholders had approved the merger and when the share value and price on the stock exchange had declined appreciably, Respondent abandoned the merger (101a, 105a, 136a). By virtue of BCL §623(e), Petitioners were reinstated to shareholder status, but they were not restored to the financial position in which they had been. They then made application to the State court for damages, counsel fees, ex-

penses and disbursements. However, the Appellate Division of the State Supreme Court in a memorandum opinion reported in 42 A.D.2d 890, 347 N.Y.S.2d 597 (see Appendix "F" at pages 37-38) construed the statute as a scheme for the regulation of corporate mergers whose comprehensive provisions precluded any relief to Petitioners. The unilateral abandonment of the merger terminated the proceeding which the statute had compelled the Petitioners to commence. The statute reinstated them to shareholder status but did not restore them to the financial position in which they were eight months earlier. It denied them a forum in which to make claim for relief and an opportunity to be heard.

Proceedings in the Courts Below

The District Court:

Petitioners then brought this action in the United States District Court for the Eastern District of New York. The State legislation of which they complain is the provision in BCL §623(e) which enables a corporation unilaterally to abandon its corporate merger, terminating the statutory judicial proceeding, reinstating dissenters to shareholder status, but depriving them of their claims for damages and losses sustained during the period when they are monetary claimants and denying them a forum in which to be heard with respect thereto.

The District Court granted Respondent corporation's motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. It found that there was no "State action," because the position of shareholders, objecting to a corporate merger, is virtually the

same now under the statute as it would have been under the common law. The District Court also concluded that the statute does not violate the due process clause of the Fourteenth Amendment. The Court found nothing arbitrary or irrational in the statute and stated that it is rationally related to a sound and legitimate State interest.

The Court of Appeals:

The Court of Appeals affirmed. It stated that Petitioners were fully aware of the statutory scheme and the potential deprivations it entails when they chose to dissent. The statutory provision was viewed by the Court of Appeals as "clearly designed to maximize the power of minority shareholders". It stated that a corporation would be induced to abandon a merger when it could not afford to pay the dissenters for their shares.

The Court of Appeals disregarded the statutory provision (BCL §623[a]) which had afforded Respondent corporation with knowledge of the number of non-assenting shareholders at least one day before the shareholders' meeting. The Court disregarded Respondent's knowledge of its lack of money to pay for such shares, and that Respondent's loan agreements prohibited the payment for such shares. The statute did not maximize the power of the minority shareholders. It deprived them of all power. It maximized the power of the Respondent corporation. Petitioners could not withdraw their dissent without the consent of the corporation. Had the shares risen in value and price in this eight-month period, Respondent would not have abandoned the merger. Even if Respondent had no money, it is reasonable to assume that its lenders would

have made available additional sums to buy shares at the low price of eight months earlier.

Petitioners' position was completely disregarded by the Court of Appeals. Their position is: The statute did accord Petitioners, as dissenting shareholders, the right to receive the value of their shares. They could have been divested of that right in a constitutionally correct manner upon abandonment of the merger and reinstatement to shareholder status; what need be done was to grant them a hearing and a forum in which to present their claim for their loss or damage resulting from such unilateral abandonment, and grant them an adjudication of their right to be compensated. The failure of the statute to make any such provision permitted the Respondent corporation to engage in an activity which is arbitrary and irrational.

Reasons for Granting the Writ

The questions are substantial. The abandonment provision which New York added to its corporation law in 1950 has been adopted in substance in 36 States, the District of Columbia, and in the Model Corporation Code of the American Bar Association. (See Appendix "D," pp. 34-35 for reference to the statute of each jurisdiction.) The construction of the provision by the Appellate Division of the New York Supreme Court, no doubt, will be followed by the courts in those jurisdictions.

I

The provision encourages a practice which is designed solely for the benefit of the corporation. It cannot result in any benefit to minority shareholders who dissent from

a proposed corporate action. When it is for the benefit of the corporation to proceed with the merger, e.g., when the market price for the dissenters' shares has risen, the corporation proceeds and has but to pay the lower price or value of the shares as of the statutory valuation date. When it is not for the benefit of the corporation to proceed, e.g., when the market price has declined, the corporation merely abandons the merger.

The statutory proceedings take from one to four years (see Appendix "E" at page 36). Since the corporation may abandon the merger at any time prior to final determination, the statutory provision does rise to "constitutional dimension". Upon abandonment, the dissenters are not restored to the financial position in which they were immediately before becoming monetary claimants. Their shares have declined in price and value. During this period they have no control over their investment. Their shares cannot be traded. They cannot withdraw their dissent, except with the consent of the corporation.

Upon objecting to the merger, pursuant to BCL §910 Petitioners acquired the right to receive the fair value of their shares, provided they complied with the procedural requirements of BCL §623. Petitioners did comply. They ceased having shareholder status. In lieu thereof they became monetary claimants. Their rights, as monetary claimants can be no less than the "expectations of interests" or "entitlements", of which they may not be deprived without observance of procedural due process. *Goldberg* v. *Kelly,* 397 U.S. 254, 261-262 (1970).

This procedural statute enables a corporation to deprive its minority shareholders, who do not assent to fundamental changes in the structure of their corporation, of substantive rights without due process. The statutory judicial proceeding, which they were compelled to commence, is automatically terminated upon the corporation's unilateral abandonment of the merger. They are denied the right to claim damages sustained as a result of the abandonment. Their damages are the difference in value and price of their shares as of the shareholders' authorization date and the value and price of their shares upon reinstatement to shareholder status when the corporation abandoned the merger. They are denied the right to claim damages for being deprived of their property during the period they were monetary claimants. They are denied the right to claim damages for being compelled to commence the statutory judicial proceeding. And they are deprived of a forum in which to be heard with respect to their claims.

This is the construction by the New York court of the statutory provision permitting a corporation unilaterally to abandon the merger which its shareholders had authorized.

The constitutionality of this statutory provision or any similar provision of any other State has not been passed on by this Court.

II

The District Court had granted Respondent corporation's motion to dismiss under Rule 12(b)(6). In dismissing the complaint, the District Court held that there was no "state action" within the meaning of the Fourteenth Amendment. The Court of Appeals did not review such ruling.

Respondent corporation abandoned the merger solely because it was permitted to do so by the provision in BCL

§623(e). The second question presented: Is the use by a corporation of this statutory provision "state action", or "private action" precluding maintenance of the action under 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343(3)?

The common law views the corporate charter as a contract between the corporation and its shareholders. The contract cannot be impaired without the consent of all parties. The State legislates. It permits impairment of the contract. It permits a corporate merger over the objections of non-assenting shareholders. It permits abandonment of the merger many months later, terminating the judicial proceeding which the statute had compelled the dissenters too commence. The statute, as enforced by the State court, forecloses the dissenters from claiming damages and losses sustained as a result of the action permitted and taken pursuant to the statute.

We submit that "state action" is present within the meaning of the Fourteenth Amendment and that the holding by the District Court is contrary to the principles enunciated by this Court in *Shelley* v. *Kraemer,* 334 U.S. 1 (1948) and *Reitman* v. *Mulkey,* 387 U.S. 369 (1967). This is all the more so because the New York courts have held that the sole and exclusive remedy available to a non-assenting shareholder is BCL §623 (*Blumenthal* v. *Roosevelt Hotel,* 202 Misc. 988, 115 N.Y.S.2d 52 (1952); *Beloff* v. *Consolidated Edison Co.,* 300 N.Y. 11 (1949); *Anderson* v. *International Mineral & Chem. Corp.,* 295 N.Y. 343 (1946)).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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230 Park Avenue
New York, N. Y. 10017
Counsel for Petitioners

APPENDIX

APPENDIX A

Opinion of the Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 770—September Term, 1974.

(Argued March 24, 1975 Decided March 25, 1975.)

Docket No. 74-2615

MAURICE GOLDBERG, CLAIRE GOLDBERG, MAURICE GOLDBERG, as Custodian for MARION GOLDBERG, BETTE GOLDBERG and JOYCE E. GOLDBERG, under The New York Uniform Gifts to Minors Act, and MAURICE GOLDBERG, HENRY J. GOLDBERG and SAMUEL M. SPRAFKIN, as Trustees under the Trusts for the benefit of MARION GOLDBERG, BETTE GOLDBERG and JOYCE E. GOLDBERG,

Plaintiffs-Appellants,

v.

ARROW ELECTRONICS, INC.,

Defendant-Appellee,

and STATE OF NEW YORK,

Defendant.

Before:

KAUFMAN, *Chief Judge,*
MULLIGAN, *Circuit Judge* and THOMSEN, *District Judge.**

Appeal from judgment by the District Court for the Eastern District of New York, Mishler, *J.*, dismissing complaint under 42 U.S.C. §1983 alleging that section 623 of

* Of the District of Maryland, sitting by designation.

the Business Corporation Law of New York effects a deprivation of property without due process of law.

Affirmed.

SAMUEL M. SPRAFKIN, New York (Mandel M. Einhorn, on the brief), *for Appellant.*

GEOFFREY M. KALMUS, New York, New York (Ellen R. Nadler, and Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll, on the brief), *for Appellee.*

PER CURIAM:

Goldberg directs his attack primarily at §623 (e) of the New York Business Corporation Law (McKinney 1963), which requires a corporation to pay the fair market value of shares dissenting to a merger only if the merger is consummated. On January 31, 1973 Arrow Electronics, Inc. abandoned the merger to which Goldberg had dissented on May 25, 1972; in the interim, under §623 (e) and (f), Goldberg had lost his status as a shareholder and became a claimant. Since the price of Arrow declined during this period, Goldberg complains that the restriction on resale of his shares, coupled with the termination of Arrow's obligation to pay for his shares when it abandoned the merger, violates due process.

We find little merit to Goldberg's contention. Section 623 is a rational scheme for determining the rights of shareholders when they oppose a merger. Goldberg was fully aware of this scheme, and the potential deprivations it entails, when he chose to dissent. Moreover, the particular provision under attack—that excuses a corporation from paying for a dissenter's shares if the merger is abandoned—is clearly designed to maximize the power of minority shareholders. A corporation would be induced to abandon

a merger when it could not afford to pay dissenters for their shares—precisely what occurred in this case.

Thus, ultimately Goldberg claims merely that Arrow has abused §623 by speculating in Goldberg's shares—protracting the appraisal process, and abandoning the merger only when the market declined below the price it would have to pay for his shares. Not only does this allegation not rise to constitutional dimension—the sole federal concern in this matter—but it has twice been rejected by state courts. *Goldberg* v. *Arrow Electronics, Inc.*, No. 22146, 1972 (Spec. Term, Pt. 1, Jan. 8, 1973) (Murtagh, *J.*); *Goldberg* v. *Arrow Electronics, Inc.*, No. 22146, 1972 (Spec. Term, Pt. 1, Apr. 2, 1973) (Chimera, *J.*), *modified*, 42 A.D. 2d 890, 347 N.Y.S. 2d 597 (1st Dept. 1973), *app. dismissed*, 33 N.Y. 2d 1004, 309 N.E. 2d 428, 353 N.Y.S. 2d 966 (1974).

Since Goldberg's due process claim is so palpably without merit, we need not consider Arrow's contentions that its acts are not "state action," and that the state court proceedings are res judicata of this §1983 action.

Affirmed.

APPENDIX B

Decision and Order of U.S. District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

74 C 1077

MAURICE GOLDBERG, *et al.*,

Plaintiffs,

—against—

ARROW ELECTRONICS, INC., and STATE OF NEW YORK,

Defendants.

November 13, 1974

In this civil rights action, plaintiffs challenge the constitutionality of section 623 of the Business Corporation Law of New York (McKinney's 1963) claiming that this statute deprived them of property without due process of law.

The facts relevant to the disposition of this action can be briefly summarized. Defendant Arrow Electronics, Inc.,[1] is a New York corporation in which the plaintiffs are stockholders. In its regular proxy statement, issued in April 1972, defendant notified its shareholders that it would propose a merger plan for corporate adoption at the next

[1] Although the State of New York voluntarily appeared in this action, the State's involvement in the events preceding the filing of this action was quite minor. Consequently, all references herein to "defendant" refer to Arrow Electronics, Inc. only.

shareholders meeting. The stockholders were advised that the plan on which they were to vote would become effective only in the event that the proposed merger was actually completed. Plaintiffs opposed the merger and voted against adoption of the plan, which was nonetheless approved.

Pursuant to section 623 of the Business Corporation Law (BCL), plaintiffs filed a written notice of election to invoke their rights as dissenting shareholders. Under section 623(h)(4) of the BCL, shareholders who properly file objection and notice of election become entitled to payment of the fair value of their shares, determined as of the day before approval of the action by the shareholders (here May 24, 1972). Since this date, the market value of the shares steadily declined. Perhaps as a result of this fact the parties were unable to reach an agreement as to the fair value of the shares, and plaintiffs initiated a proceeding in state court to fix the value of the shares. However, on January 31, 1973, defendant abandoned the merger proposal and refused to pay plaintiffs for their shares, relying on section 623(e) of the BCL. This provision of the statute makes the right of dissenting shareholders to receive payment for their shares contingent upon completion of the merger.[2] Plaintiffs' state court action to fix the value and be paid for their shares was denied on the basis of section 623(e).[3]

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[2] Section 623(e) provides in pertinent part:

> If . . . the proposed corporate action is abandoned . . . (the shareholder) shall not have the right to receive payment for his share and he shall be reinstated to all his rights as a shareholder as of the filing of his notice of election . . . .

[3] Plaintiffs actually initiated two state court proceedings. In the first, commenced on October 12, 1972, plaintiffs sought to have

Plaintiffs now bring this action under the Civil Rights Act of 1871, 42 U.S.C. §1983, challenging the constitutionality of section 623 and of defendant's refusal to pay them pursuant to this section. Plaintiffs have moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Defendants have moved to dismiss the complaint, under Rule 12(b)(6), on the ground that it fails to state a claim on which relief can be granted.[4] For reasons set forth below, defendant's motion to dismiss is granted.

Since the *Civil Rights Cases,* 109 U.S. 3, 3 S.Ct. 18 (1883), it has been recognized that the fourteenth amendment and section 1983 as well,[5] apply only to actions of states, and not to actions which are private. To proceed with a section 1983 action therefore, it is first necessary to establish that the deprivation complained of was car-

---

the value of their shares fixed, and to require defendants to pay them this amount. This request was denied on the ground that it was premature since plaintiffs had only a contingent right to payment until the merger was completed. Index No. 22,146/1972, Sup. Ct. (N.Y. Co. Spec. Term Pt. I) January 1, 1973.

The second action, brought after defendant abandoned its merger plan, sought expenses, damages and counsel fees. Except for awarding counsel fees, this request was denied. Index No. 22,146/1972, Sup. Ct. (N.Y. Co. Spec. Term Pt. I) March 20, 1973. Plaintiffs appealed both rulings and the Appellate Division affirmed. 42 A.D. 2d 890 (1973). The Court of Appeals dismissed plaintiffs' further appeal. 33 N.Y.2d 1004 (1974).

[4] Defendant has also cross-moved for summary judgment. However, the determinations made by the Court regarding plaintiffs' claim make it unnecessary to consider this motion.

[5] The state action requirement of the fourteenth amendment has been interpreted to be equivalent to the "under the color of law" provision of section 1983. *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 152 n. 7, 90 S. Ct. 1598 (1970); *United States* v. *Price,* 383 U.S. 787, 794-95, n. 7, 85 S. Ct. 1152 (1966).

ried out under color of state law, *e.g., Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 92 S.Ct. 1965 (1972). To satisfy this requirement a party must demonstrate that the state or its agents participated in or in some fashion encouraged the allegedly unconstitutional action. *Id., Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598 (1970).

Plaintiffs assert that state action is present in this case because the state, through enactment of section 623, directly enabled defendant to deprive the plaintiffs of a valuable property right. Specifically, plaintiffs maintain that shareholder status and the right to reimbursement are property interests protected by the due process clause of the fourteenth amendment and section 623(e) deprived them of these property rights without due process of law.

From plaintiffs' complaint and accompanying motion papers it is evident that the sole basis presented for alleging state action is the fact that the state has legislated in this area. In the recent decision *Shirley* v. *State National Bank of Connecticut,* 493 F.2d 739 (2d Cir. 1974) the Court of Appeals for the Second Circuit considered a very similar argument. In that case, appellant attacked the repossession of her car as unconstitutional. Although the repossession was carried out by the appellee bank, appellant argued that there was state action because the repossession was authorized by statute. (Section 42-98(a) Conn. Gen. Rev. Stat.) The court found that passage of this statute was essentially neutral and did not sufficiently involve the state in the activities of the bank as to create a basis for finding state action. *Id.* at 744-45.

Since the enactment of section 623 constitutes the sole basis for plaintiffs' claim of state action in this case,

Shirley appears to mandate a finding of no state action. Plaintiffs strenuously assert, however, that the present case is different from *Shirley,* because unlike the statute involved in that case, section 623 significantly alters the common law rights of dissenting stockholders. Plaintiffs conclude from this fact that the state has not been neutral, but has instead affirmatively involved itself in the alleged deprivation. Therefore, they maintain, state action is present.

Plaintiffs' conclusion is overly simple. The fact that the law under attack creates, rather than codifies common law rights is not determinative of the state action issue. *Shirley* v. *State National Bank of Connecticut, supra,* at 746, (Kaufman, C.J., dissenting) and authorities cited therein. Rather, it is only by sifting facts and weighing circumstances that the involvement of the state can be attributed its proper significance. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 722, 81 S.Ct. 856 (1961). Accordingly, it is necessary to examine the statute and the effect that it has had on plaintiffs.

Prior to the enactment of the first appraisal statutes, from which section 623 is derived, a corporation had to obtain the unanimous consent of all shareholders to carry out a merger. When the appraisal statutes were passed, however, the unanimous consent requirement was abandoned. In return, the statute provided dissenting shareholders a means of receiving compensation for their shares. To give corporations more flexibility, while at the same time protecting the rights of dissenters, the statute provided that dissenting shareholders would cede their shareholder status with the filing of their notice of dissent, and

would then become monetary claimants against the corporations, their right to payment being contingent only upon the completion of the merger. *Anderson* v. *International Minerals and Chemical Corp.,* 295 N.Y. 343 (1946).

It is apparent from this description that the change in common law rights affected by section 623 had no bearing on plaintiffs. Under common law, if the plaintiffs opposed the merger, the merger would be precluded, and plaintiffs would remain as regular shareholders. Here, plaintiffs also opposed the merger, and have also been returned to their status as shareholders. Thus, their position now is virtually the same as it would have been under the common law. It follows that there is no greater degree of state involvement in the activity plaintiffs complain of here than existed in *Shirley.* Therefore, there is no state action and the motion to dismiss must be granted.

Beyond the fact that the state action predicate is absent, the claim also fails on the merits. Reduced to its essentials, plaintiffs' claim challenges the constitutionality of the statutory scheme contained in section 623. It is quite clear that this section does not violate the due process clause of the fourteenth amendment. While plaintiffs would obviously prefer that the statute accord them a vested right of compensation for their shares, the failure of the statute to so provide does not even approach the degree of arbitrary or irrational activity which must be present in order to upset the statute. *See, e.g., Dandridge* v. *Williams,* 397 U.S. 471, 90 S.Ct. 1153 (1970). Instead, it is clear that section 623 is rationally related to a sound and legitimate state interest, *Anderson* v. *International Minerals and Chemical Corp., supra.*

Appendix B

Plaintiffs' motion for summary judgment is denied. Defendants' motion to dismiss is granted and it is

So Ordered.

The Clerk of the Court is directed to enter judgment in favor of defendants and against plaintiffs dismissing the complaint.

Jacob Mishler
U.S.D.J.

APPENDIX C

Statutory Provisions Involved

BUSINESS CORPORATION LAW
OF THE STATE OF NEW YORK

§ 910. Right of shareholder to receive payment for shares upon merger, consolidation or sale, lease, exchange or other disposition of assets

(a) A shareholder of a domestic corporation shall, subject to and by complying with section 623 (Procedure to enforce shareholder's right to receive payment for shares), have the right to receive payment of the fair value of his shares and the other rights and benefits provided by such section, in the following cases:

(1) Any shareholder entitled to vote who does not assent to the taking of an action specified in subparagraphs (A) and (B).

(A) Any plan of merger or consolidation to which the corporation is a party; * * *

Business Corporation Law § 623

Procedure to enforce shareholder's right to receive payment for shares.—(a) A shareholder intending to enforce his right under a section of this chapter to receive payment for his shares if the proposed corporate action referred to therein is taken shall file with the corporation, before the meeting of shareholders at which the action is submitted to a vote, or at such meeting but before the vote, written objection to the action. The objection shall include a statement that he intends to demand payment for his shares if the action is taken. Such objection is not required from any shareholder to whom the corporation did not give notice of such meeting in accordance with this chapter or where the proposed action is authorized by written consent of shareholders without a meeting.

(b) Within ten days after the shareholders' authorization date, which term as used in this section means the date on which the shareholders' vote authorizing such action was taken, or the date on which such consent without a meeting was obtained from the requisite shareholders, the corporation shall give written notice of such authorization or consent by registered mail to each shareholder who filed written objection or from whom written objection was not required, excepting any who voted for or consented in writing to the proposed action.

(c) Within twenty days after the giving of notice to him, any shareholder to whom the corporation was required to give such notice and who elects to dissent shall file with the corporation a written notice of such election, stating his name and residence address, the number and classes of shares as to which he dissents and a demand for payment

of the fair value of his shares. Any shareholder who elects to dissent from a merger under section 905 (Merger of subsidiary corporation) or paragraph (c) of section 907 (Merger or consolidation of domestic and foreign corporations) shall file a written notice of such election to dissent within twenty days after the giving to him of a copy of the plan of merger or an outline of the material features thereof under section 905.

(d) A shareholder may not dissent as to less than all of the shares, as to which he has a right to dissent held by him of record, that he owns beneficially. A nominee or fiduciary may not dissent on behalf of any beneficial owner as to less than all of the shares of such owner, as to which such nominee or fiduciary has a right to dissent, held of record by such nominee or fiduciary.

(e) Upon filing a notice of election to dissent, the shareholder shall cease to have any of the rights of a shareholder except the right to be paid the fair value of his shares and any other rights under this section. A notice of election may be withdrawn by the shareholder at any time before an offer is made by the corporation, as provided in paragraph (g), to pay for his shares. After such offer, withdrawal of a notice of election shall require the written consent of the corporation. If a notice of election is withdrawn, or the proposed corporate action is abandoned or rescinded, or a court shall determine that the shareholder is not entitled to receive payment for his shares, or the shareholder shall otherwise lose his dissenter's rights, he shall not have the right to receive payment for his shares and he shall be reinstated to all his rights as a shareholder as of the filing of his notice of election, including any intervening preemptive rights and the right to payment of any intervening dividend or other

distribution or, if any such rights have expired or any such dividend or distribution other than in cash has been completed, in lieu thereof, at the election of the corporation, the fair value thereof in cash as determined by the board as of the time of such expiration or completion, but without prejudice otherwise to any corporate proceedings that may have been taken in the interim.

(f) At the time of filing the notice of election to dissent or within one month thereafter the shareholder shall submit the certificates representing his shares to the corporation, or to its transfer agent, which shall forthwith note conspicuously thereon that a notice of election has been filed and shall return the certificates to the shareholder or other person who submitted them on his behalf. Any shareholder who fails to submit his certificates for such notation as herein specified shall, at the option of the corporation exercised by written notice to him within forty-five days from the date of filing of such notice of election to dissent, lose his dissenter's rights unless a court, for good cause shown, shall otherwise direct. Upon transfer of a certificate bearing such notation, each new certificate issued therefor shall bear a similar notation together with the name of the original dissenting holder of the shares and a transferee shall acquire no rights in the corporation except those which the original dissenting shareholder had after filing his notice of election.

(g) Within seven days after the expiration of the period within which shareholders may file their notices of election to dissent, or within seven days after the proposed corporate action is consummated, whichever is later (but in no case later than ninety days from the shareholders' authorization date), the corporation or, in the case of a merger or consolidation, the surviving or new corporation, shall

make a written offer by registered mail to each shareholder who has filed such notice of election to pay for his shares at a specified price which the corporation considers to be their fair value.

If the corporate action has not been consummated upon the expiration of the ninety-day period after the shareholders' authorization date, the offer may be conditioned upon the consummation of such action. Such offer shall be made at the same price per share to all dissenting shareholders of the same class, or if divided into series, of the same series and shall be accompanied by a balance sheet of the corporation whose shares the dissenting shareholder holds as of the latest available date, which shall not be earlier than twelve months before the making of such offer, and a profit and loss statement or statements for not less than a twelve-month period ended on the date of such balance sheet or, if the corporation was not in existence throughout such twelve-month period, for the portion thereof during which it was in existence. If within thirty days after the making of such offer, the corporation making the offer and any shareholder agree upon the price to be paid for his shares, payment therefor shall be made within sixty days after the making of such offer or the consummation of the proposed corporate action, whichever is later, upon the surrender of the certificates representing such shares.

(h) The following procedure shall apply if the corporation fails to make such offer within such period of seven days, or if it makes the offer and any dissenting shareholder or shareholders fail to agree with it within the period of thirty days thereafter upon the price to be paid for their shares:

(1) The corporation shall, within twenty days after the expiration of whichever is applicable of the two periods last

mentioned, institute a special proceeding in the supreme court in the judicial district in which the office of the corporation is located to determine the rights of dissenting shareholders and to fix the fair value of their shares. If, in the case of merger or consolidation, the surviving or new corporation is a foreign corporation without an office in this state, such proceeding shall be brought in the county where the office of the domestic corporation, whose shares are to be valued, was located.

(2) If the corporation fails to institute such proceeding within such period of twenty days, any dissenting shareholder may institute such proceeding for the same purpose not later than thirty days after the expiration of such twenty day period. If such proceeding is not instituted within such thirty day period, all dissenter's rights shall be lost unless the supreme court, for good cause shown, shall otherwise direct.

(3) All dissenting shareholders, excepting those who, as provided in paragraph (g), have agreed with the corporation upon the price to be paid for their shares, shall be made parties to such proceeding, which shall have the effect of an action quasi in rem against their shares. The corporation shall serve a copy of the petition in such proceeding upon each dissenting shareholder who is a resident of this state in the manner provided by law for the service of a summons, and upon each nonresident dissenting shareholder either by registered mail and publication, or in such other manner as is permitted by law. The jurisdiction of the court shall be plenary and exclusive.

(4) The court shall determine whether each dissenting shareholder, as to whom the corporation requests the court to make such determination, is entitled to receive payment for his shares. If the corporation does not request any such determination or if the court finds that any dissenting shareholder is so entitled, it shall proceed to fix the value of the shares, which, for the purposes of this section, shall be the fair value as of the close of business on the day prior to the shareholders' authorization date, excluding any appreciation or depreciation directly or indirectly induced by such corporate action or its proposal. The court may, if it so elects, appoint an appraiser to receive evidence and recommend a decision on the question of fair value. Such appraiser shall have the power, authority and duties specified in the order appointing him, or any amendment thereof.

(5) The final order in the proceeding shall be entered against the corporation in favor of each dissenting shareholder who is a party to the proceeding and is entitled thereto for the value of his shares so determined.

(6) The final order shall include an allowance for interest at such rate as the court finds to be equitable, from the shareholders' authorization date to the date of payment. If the court finds that the refusal of any shareholder to accept the corporate offer of payment for his shares was arbitrary, vexatious or otherwise not in good faith, no interest shall be allowed to him.

(7) The costs and expenses of such proceeding shall be determined by the court and shall be assessed against the corporation, except that all or any part of such costs and expenses may be apportioned and assessed, as the court may determine, against any or all of the dissenting shareholders who are parties to the proceeding if the court finds that their refusal to accept the corporate offer was arbitrary, vexatious or otherwise not in good faith. Such expenses shall include reasonble compensation for and the reasonable expenses of the appraiser, but shall exclude the fees and expenses of counsel for and experts employed by any party unless the court, in its discretion, awards such fees and expenses. In exercising such discretion, the court shall

consider any of the following: (A) that the fair value of the shares as determined materially exceeds the amount which the corporation offered to pay; (B) that no offer was made by the corporation; and (C) that the corporation failed to institute the special proceeding within the period specified therefor.

(8) Within sixty days after final determination of the proceeding, the corporation shall pay to each dissenting shareholder the amount found to be due him, upon surrender of the certificates representing his shares.

(i) Shares acquired by the corporation upon the payment of the agreed value therefor or of the amount due under the final order, as provided in this section, shall become treasury shares or be cancelled as provided in section 515 (Reacquired shares), except that, in the case of a merger or consolidation, they may be held and disposed of as the plan of merger or consolidation may otherwise provide.

(j) No payment shall be made to a dissenting shareholder under this section at a time when the corporation is insolvent or when such payment would make it insolvent. In such event, the dissenting shareholder shall, at his option:

(1) Withdraw his notice of election, which shall in such event be deemed withdrawn with the written consent of the corporation; or

(2) Retain his status as a claimant against the corporation and, if it is liquidated, be subordinated to the rights of creditors of the corporation, but have rights superior to the non-dissenting shareholders, and if it is not liquidated, retain his right to be paid for his shares, which right the corporation shall be obliged to satisfy when the restrictions of this paragraph do not apply.

(3) The dissenting shareholder shall exercise such option under subparagraph (1) or (2) by written notice filed with the corporation within thirty days after the corporation has given him written notice that payment for his shares cannot be made because of the restrictions of this paragraph. If the dissenting shareholder fails to exercise such option as provided, the corporation shall exercise the option by written notice given to him within twenty days after the expiration of such period of thirty days.

(k) The enforcement by a shareholder of his right to receive payment for his shares in the manner provided herein shall exclude the enforcement by such shareholder of any other right to which he might otherwise be entitled by virtue of share ownership, except as provided in paragraph (e), and except that this section shall not exclude the right of such shareholder to bring or maintain an appropriate action to obtain relief on the ground that such corporate action will be or is unlawful or fraudulent as to him.

(l) Except as otherwise expressly provided in this section, any notice to be given by a corporation to a shareholder under this section shall be given in the manner provided in section 605 (Notice of meetings of shareholders).

(m) This section shall not apply to foreign corporations except as provided in subparagraph (e) (2) of section 907 (Merger or consolidation of domestic and foreign corporations).

APPENDIX D

Jurisdictions With Statutory Provision Permitting Abandonment of Corporate Merger

California	—Cal. Corp. Code Ann. 4316
Connecticut	—Conn. Gen. Stat. 33-374(i)
Delaware	—Del. Code Ann. title 8 section 251(d)
Florida	—Florida Statutes Section 608.23(3)
Georgia	—Ga. Code Ann. Sect. 22-1202(d)
Hawaii	—Hawaii Rev. Stat. Sect. 417-28
Illinois	—Ill. Ann. Stat. 157.70
Iowa	—Iowa Code Ann. Sect. 496A.78
Kansas	—Kan. Stat. Ann. 17-6701(d)
Kentucky	—Ky. Rev. Stat. Ann. Sect. 271A405(2)
Louisiana	—La. Rev. Stat. Sect. 12:131(H)
Maine	—Me. Rev. Stat. Ann. Title 13A Sect. 909 (5B)
Maryland	—Md. Ann. Code Art. 23 Sect. 66(h) and Art. 23 Sect. 73(i)(4)
Massachusetts	—Mass. Ann. Laws Ch. 156 Sec. 78(7)
Michigan	—Mich. Stat. Ann. Sect. 450.1765
Mississippi	—Miss. Code Ann. Sect. 5309-172
Missouri	—Ann. Mo. Stat. Sect. 351.455(4) (Vernon's)
Montana	—Mont. Rev. Code Sec. 15-2274

Nebraska	—Neb. Rev. Stat. Sec. 21-2080
New Jersey	—N.J. Stat. Ann. Sect. 14A:11-4(e)
New Mexico	—N.M. Stat. Ann. Sec. 51-28-4(B)
Ohio	—Ohio Rev. Code Ann. Sect. 1701.85
Oklahoma	—Okla. Stat. Ann. Title 18 Sect. 1.161(d)
Oregon	—Ore. Rev. Stat. Sect. 57.442(2)
Pennsylvania	—Pa. Stat. Ann. Title 15 Sect. 1515(c)
Rhode Island	—R.I. Gen. Laws Ann. Sect. 7-1.1-74
South Carolina	—S.C. Code Sect. 12-16-27(e)
South Dakota	—S.D. Comp. Laws of 1967 Sect. 47-6-27
Tennessee	—Tenn. Code Ann. Sect. 48-916(b)
Utah	—Utah Code Ann. Sect. 16-10-76
Vermont	—Vt. Stat. Ann. Title 11 Sect. 2004(b)
Virginia	—Va. Code Sect. 13.1-75
Washington	—Rev. Code Wash. Ann. Sect. 23A24.040
West Virginia	—W.Va. Code Sect. 31-1-123(6)
Wisconsin	—Wis. Stat. Ann. Sect. 180.72(3)
Wyoming	—Wyo. Stat. Sect. 17-36.72
District of Columbia	—D.C. Code Ency. Ann. Sect. 29-927i(d)

APPENDIX E

Cases Indicating Time Period From Date of Shareholders Meeting Authorizing Merger to Date of Initial Determination of Value by Court, Without Regard to Any Additional Time for Appeal

Matter of Dorsey	31 Misc.2d 747 221 N.Y.S.2d 927	2 yrs. 3 mo. 9 days
Lipe Rollway Corp. v. Seligson	59 Misc.2d 805 300 N.Y.S.2d 478	1 yr. 11 mo. 16 days
Matter of Behrens	— Misc. — 61 N.Y.S.2d 179	1 yr. 7 mo. 11 days
Matter of Silverman	— Misc. — 115 N.Y.S.2d 97	1 yr. 5 mo. 15 days
Matter of Deutchmann	— Misc. — 113 N.Y.S.2d 823	1 yr. 4 mo. 19 days
Matter of Cheney	168 Misc. 353 5 N.Y.S.2d 985	1 yr. 12 days

In jurisdictions, other than New York, the duration of the proceedings have been from 2 years to 4½ years. (See 50 Boston University Law Review 57, 62 n. 21)

APPENDIX F

Opinion of the New York Supreme Court, Appellate Division, First Department, Terminating the State Court Statutory Proceeding

42 A.D.2d 890, 347 N.Y.S.2d 597

Application of Maurice Goldberg, etc., *et al., Petitioners-Appellants,* To determine their rights, etc. in and from Arrow Electronics, Inc., *Respondent-Respondent,* under Section 623 of the Business Corporation Law.

Sept. 20, 1973.

Before Stevens, *P.J.*, and Markewich, Nunez, Murphy and Tilzer, *JJ.*

Per Curiam.

Order, Supreme Court, New York County (Murtagh, J.), entered January 8, 1973, unanimously affirmed. Respondent shall recover of appellants $40 costs and disbursements of this appeal.

Order, Supreme Court, New York County (Chimera, J.), entered April 2, 1973, unanimously modified, on the law and the facts, to strike therefrom the provision for counsel fee and to vacate the reference to fix the amount thereof, and otherwise affirmed, without costs and without disbursements.

Petitioners-appellants, holders of approximately five percent of the stock of the corporate respondent-respondent,

and objectants to a proposed merger proposal, instituted a valuation proceeding (section 623, Business Corporation Law). Special Term found that the merger, not yet consummated, might well be abandoned, and that respondent was not proceeding untimely, and, concluding that the proceeding was premature, denied the application without prejudice to renewal either upon the merger's consummation or the passage of an unreasonable period of time without either consummation or abandonment. The first appeal is from that order; it is affirmed.

Less than two months after the filing of that order, the merger plan having been formally abandoned in the interim, petitioners moved for fixation of interest on the value of their stock for the period running from authorization of the merger to its abandonment. Special Term denied that branch of the application, finding no authorization therefor, in the circumstances disclosed, in the statute (see section 623[e]). It was specifically found—and we agree—that respondent's claimed bad faith had not been proven. At the same time, however, the court granted an accompanying request for counsel fee, citing as authority section 623(h)(7), and referring the issue of amount thereof to court's special referee. Respondent appealed from the award of counsel fee; petitioners, from denial of interest. We reverse as to the first and affirm as to the second. The statutory scheme for regulation of corporate mergers and particularly the comprehensive provisions thereof for protection of dissenting stockholders do not, in the circumstances found here, make any provision in either cited subdivision of the section or anywhere else for either the relief granted or withheld by Special Term. The application should have been denied in toto.